## **Tri-State Regional Special Education Law Conference**

# **Confidentiality Issues and the Provision of Special Education**

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### I. Introduction

Privacy rights, focusing on the legal requirements imposed by federal law to maintain the confidentiality of the education records of a student, takes on a new dimension and complexity when applied to the provision of special education and related services. The provision of special education services oftentimes involves the sharing of extremely sensitive and personal information between the family/school/other public and private service providers. This presentation will address the legal and practical issues involved in implementing privacy and confidentiality requirements.

## II. Legal Basis

- A. The Family Education Rights and Privacy Act (FERPA), (34 Code of Federal Regulations Part 99), commonly referred to as the "Buckley Amendment," provides that public and private schools which receive federal education funds must protect the confidentiality of all students' education records while also affording parents the right to inspect their child's records. Office of Special Education Programs (OSEP) Policy Letter, IDELR (Individuals with Disabilities Education Law Report) 211:368 (1985).
- B. The Individuals with Disabilities Education Act (IDEA) provides additional confidentiality protection for education records of students with disabilities who are in need of special education. In particular, the IDEA regulations (34 CFR 300.610 300.627) have more specific requirements for parental inspection of their student's educational records, the destruction of educational records and the training of school personnel.

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- C. Section 504 of the Rehabilitation Act of 1973 requires school districts to have a system of procedural safeguards for students with disabilities and their parents which affords them the right to examine relevant records (34 CFR 104.36).
- D. The Education Department General Administrative Regulations (EDGAR) (34 CFR Parts 76 and 80) establish record retention standards by a state or subgrantee to show its compliance with federal program requirements including the IDEA.
- E. Copyright law prohibits the copying of protected materials without the permission of the copyright holder.
- F. Health Insurance Portability and Accountability Act of 1996 (HIPAA) (45 CFR Parts 160,162, and 164) which protects the privacy and security of individually identifiable health information.

#### III. Education Records

### A. Definitions

Education records. (a) The term means those records that are:(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution. (FERPA Regulation 34 CFR 99.3)

Education records means the type of records covered under the definition of "education records in the Family Educational Rights and Privacy Act. (IDEA Regulation 34 CFR 300.611(b))

Note: It should be stressed that this definition is dependent on what information the records contain not the location where they are kept. There is no federal law requiring that a student's education records, including the IEP, be maintained at the same location at which the student is receiving services. Letter to Woodson 213 IDELR 224 (United States Department of Education, Office of Special Education Programs (1989))

<u>Record</u> means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

<u>Personally Identifiable Information</u> The term includes, but is not limited to—

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
- B. This definition has been interpreted to include such information as:
  - 1. the student's cumulative file;
  - 2. grades, test scores after they are recorded by the school;
  - 3. disciplinary records;
  - 4. medical and health information which the school maintains;
  - 5. test protocols which contain personally identifiable information <a href="Letter to Thomas"><u>Letter to Thomas</u></a> 211 IDELR 420 (United States Department of Education, Family Policy Compliance Office) (1986)), <a href="Letter to MacDonald"><u>Letter to MacDonald</u></a> 20 IDELR 1159 (United States Department of Education, Office of Special Education Programs) (1993)). However, if protocols do not contain personally identifiable information, they are not considered education records.
  - 6. test instruments, question booklets, answer sheets, evaluations, surveys, inventories and other evaluation material that identify a student and are maintained by the school district or by a party

- for the district such as a psychologist are education records.

  <u>Letter to Mathews</u> 105 LRP 58483 (United States Department of Education, Family Policy Compliance Office (2005))
- 7. juvenile records maintained by the school district's attorney as its agent. Belanger v. Nashua School District, 21 IDELR 429 (United States District Court, New Hampshire) (1994)).
- 8. IEP meeting tapes <u>Letter to Baugh</u> 211 IDELR 479 (United States Department of Education, Office of Special Education Programs) (1987))
- 9. invoices for legal services pertaining to a student, <u>Letter to Howey</u> 17 IDELR 701 (United States Department of Education, Family Policy Compliance Office (1991)), and
- treatment records/therapeutic plans of a psychiatric hospital for students under age 18 <u>Letter to Woodson</u>, 213 IDELR 224 (United States Department of Education, Office of Special Education Programs) (1989))
- C. The major exception to this definition are records which are kept in the sole possession of the teacher, administrator or other school official, used only as a personal memory aid and are not accessible or revealed to any other person except a temporary substitute. It should be noted that even if a particular record is not considered an education record, the record is still subject to being subpoenaed in a legal action.
  - 1. Disclosure means to permit access to or to release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written or electronic means.
  - 2. "Talley sheets" which were personal notes kept by the teacher to tally the number of times a student accomplished tasks under her IEP goals and objectives were not education records since no one other than the teacher had viewed or had access to them.

    Board of Education of the City of Toledo v. Horen 55 IDELR 102 (United States District Court, Northern District, Ohio (2010)). A school district did not violate the law when it refused to provide a parent with access to personal notes taken

by a teacher during a meeting to resolve a conflict between the teacher and parent, Mills Public School Mills Public School, 21 IDELR 1064 (United States Department of Education, Office for Civil Rights) (1994))

3. Other exceptions to the "education records" definition include records created by law enforcement units of a school, student employment records and information about individuals after they are no longer students and grades on peer graded papers before they are collected and recorded by a teacher.

# IV. Policy Requirements

A. The IDEA requires that States must have policies and procedures in effect to ensure that public agencies in the state comply with IDEA requirements (34 CFR 300.610 through 300.626) related to protecting the confidentiality of any personally identifiable information collected, used or maintained under Part B of the IDEA. (34 CFR 300.123) Parents must be fully informed about the requirements of the State's policies. (34 CFR 300.612)

### V. Parental Rights

- A. Each education agency must annually notify parents of students currently in attendance of their FERPA rights (34 CFR 99.7). The notice must include the right to:
  - 1. inspect and review their child's education records;
  - 2. request amendment of their child's education records that the parent or eligible student believes to be inaccurate, misleading or otherwise in violation of the student's privacy rights;
  - 3. consent to disclosure of their child's education records unless otherwise authorized by FERPA;
  - 4. file a complaint with the U.S. Department of Education alleging non-compliance with FERPA;

The notice must also include:

- 1. The procedure for exercising the right to inspect and review education records;
- 2. The procedure for requesting amendment of the records:
- 3. If the educational agency has a policy of disclosing education records, a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

This notice may be provided by any means that are reasonably likely to inform the parents or eligible students of their rights including effectively notifying parents or eligible students who are disabled. In addition, the notice shall effectively notify parents who have a primary or home language other than English.

- B. The IDEA requires that a Notice of Procedural Safeguards shall be provided parents/adult student at a minimum:
  - 1. Initial referral for evaluation
  - 2. Once per year
  - 3. Parental request for an additional copy
  - 4. Filing a due process hearing complaint or administrative complaint
  - 5. When the school is seeking a disciplinary change of placement.

The content of the Procedural Safeguards must include a full explanation of rights including the right of access to educational records (34 CFR 300.504)

C. FERPA gives either parent the right of access to the education records of their child unless there is a court order, state statute or legally binding document specifically revoking this right (34 CFR 99.4).

A parent has a right to inspect or authorize in writing another person to inspect the education records within 45 days of the request or before an IEP meeting or due process hearing (34 CFR 99.10 and 34 CFR 300.613).

The right to inspect the records includes the right to a response from the school to reasonable requests for explanations and interpretations of the record. (34 CFR 300.613(b)(1)).

The parent also has a right to obtain a copy of the record if failure to do so would effectively prevent the parent from exercising their right to inspect and review the record. A fee may be charged for copies if the fee does not effectively prevent the parents from exercising their inspection rights. (34 CFR 300.613 (b)(2) and 617)

The regulations do not define "effectively prevent," but historically the regulations have been interpreted to mean that a parent shall receive copies of the records if he or she lives too far from the school district to see the records in person. If the parent lives near enough to the sending school district that copies of the education records do not need to be provided, he or she maintains the right of inspection and review. Letter to Kincaid 213 IDELR 271 (United States Department of Education, Office of Special Education Programs) (1989))

- D. A school district is not required, however, to provide a parent representative a copy of the records. Letter to Longest 213 IDELR 173 (United States Department of Education, Office of Special Education Programs) (1988))
- E. Should a parent feel that their child's education records contain information which is inaccurate or misleading, the district must have a process in place whereby parents may seek clarification or removal of the disputed information. If the school decides not to amend the record as requested, it shall inform the parent of its decision and their right to a hearing. (34 CFR 99.20 and 34 CFR 300.618) Note that this hearing is distinct from an IDEA due process hearing. (34 CFR 99.22 and 34 CFR 300.619)..

If the disputed record is ultimately found to be accurate, the parent still has the right to attach a written statement commenting on the information or setting forth any reasons for disagreeing with the school's decision. The parent's statement must be maintained as part of the student's record and be provided to any party who is given the disputed record. (34 CFR 300.620(c))

VI. Disclosure of Records without Parental Consent

FERPA (34 CFR 99.31) allows a school district to disclose the education records of a student without the parent's consent in the following instances:

- A. The disclosure is to school officials with a legitimate educational interest.
  - 1. The FERPA Policy requirements state that a district must define "a school official with a legitimate educational interest." School policies should be referred to in order to determine whether a contracted consultant or evaluator would be covered.
  - 2. This definition has been interpreted to include contracted individuals performing professional services as part of the operation of the district including expert witnesses. Letter to Presto 213 IDELR 213 (United States Department of Education, Office of Special Education Programs) (1988)) Consultants contracted to provide educational services.

    Brazosport, TX Independent School District, 16 IDELR 908 (United States Department of Education, Office for Civil Rights) (1990)). A school attorney. Letter to Diehl 22 IDELR 734 (United States Department of Education, Office of Special Education Programs) (1995))
- B. The disclosure is to school officials of another school system or a post-secondary institution where the student seeks or intends to enroll. Such a disclosure must be reported to the parent by sending a notice to their last known address unless the request is initiated by the parent or the disclosure is specified in local policy.
  - 1. The question whether a school district can withhold the records from another school district due to outstanding fees was addressed by OSEP. (1989). OSEP stated that parents, not districts, are the only parties guaranteed access to educations records. If the parent is entitled to receive a copy of the records, such right may not be restricted due to nonpayment of fees. Therefore, parents may provide the receiving school with the entire record or a portion of it. Nevertheless, the receiving school must still provide a free appropriate public education to the student. Letter to Kincaid 213 IDELR 271 (United States Department of Education, Office of Special Education Programs) (1989))
  - 2. Under FERPA, schools must use "reasonable methods" to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the school discloses personally identifiable information from education records. (34 CFR 99.31(c))

What are those reasonable methods for determining the identity of a parent who asked to view a student's records? The Education Department refused to define the term, stating that because of "the differences in size, complexity, and access to technology, we believe that educational agencies and institutions should have the flexibility to decide the methods for identification and authentication of identity best suited to their own circumstances." 73 Fed. Reg. 74840 through 73 Fed. Reg. 74841 (2008).

- C. The disclosure is to authorized representatives of the Comptroller General of the United States, the Secretary of Education or state or local education authorities carrying out auditing or program evaluations.
- D. The disclosure is to accrediting organizations in carrying out their functions.
- E. The disclosure is to organizations conducting studies on behalf of the education agency to develop tests, evaluate programs or improve instruction
- F. The disclosure is to parents of an adult student if the student is a dependent under the IRS code
- G. The disclosure is to comply with a judicial order or subpoena. The District must first make a reasonable effort to notify the parent/eligible student before complying.
- H. The disclosure is in connection with a health or safety emergency to appropriate parties if knowledge of the information is necessary to protect the health or safety of the student or others.

The United States Department of Education issued clarification on the application of the Family Rights and Privacy Act (FERPA) to issues of safety in the school environment. The Department underscored that FERPA allows school officials to disclose personally identifiable information from the records of a student without consent in order to protect the health or safety of students or others. This includes law enforcement officials, public health officials and trained medical personnel. This provision is limited to emergency situations. In addition, the Department emphasized that FERPA does not prohibit a school official from disclosing information about a student if the information is obtained through the official's personal knowledge or observation and not from the student's educational records. Balancing Student Privacy and School Safety: A Guide to the Family Educational

Rights and Privacy Act for Elementary and Secondary Schools (United States Department of Education, Family Policy Compliance Office (October 2007)).

Under FERPA there is no specific exception that permits schools to disclose information to local law enforcement unless it is an emergency, or to comply with a court order. <u>Letter to Schaffer</u>, (U.S. Dept. of Education (2000)).

I. The disclosure is deemed "directory information" under local policy.

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

- (a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or
- part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.
- b) Directory information does not include a student's—(1) Social security number; or (2) Student identification (ID) number, except as provided in paragraph (c) of this definition.
- (c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and (2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user. (34 CFR 99.3)

What conditions apply to disclosing directory information? (34 CFR

99.37)

- (a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:
- (1) The types of personally identifiable information that the agency or institution has designated as directory information;
- (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student designated as directory information; and
- (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.
- (b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.
- (c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to –
- (1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled; or
- (2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.
- (d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

Note: If the disclosure of an education record is made to a person other than the parent, a school official with a legitimate educational interest, or to a person authorized by the parent, the District is required to keep a written record of each request and disclosure. (34 CFR 99.32).

J. The disclosure concerns sex offenders and other individuals required to register under the Violent Crime Control and Law Enforcement Act.

### VII. Destruction of Records

- A. The FERPA states only that a district may not destroy any records if there is an outstanding request to inspect them. The IDEA goes beyond this requirement stating that the district must inform the parents when records are no longer needed to provide educational services and must be destroyed at the parents request. (34 C.F.R. 300.624). For purposes of the IDEA, "destruction" means the physical destruction or removal of personal identifiers so that the information is no longer personally identifiable (34 CFR 300.611(a)).
- B. OCR has ruled that a district's practice of destroying test protocols even without a pending request to inspect them effectively denied a parent's access to the education records of their child and therefore violated Section 504 requirements. St. Charles Community School District #303, 17 IDELR 18 (OCR 1990).

### VIII. Retention of Records

- A. The IDEA allows a district to permanently maintain certain records such as a student's name, address, phone number, grades, attendance record, classes, grade level completed and year completed. (34 C.F.R. 300.624(b)).
- B. Federal program regulations (EDGAR) require that certain records such as IEPs and eligibility reports be retained for a period of three years. (34

C.F.R. 80.42)

C. Each agency must keep a record of parties obtaining access to education records collected, maintained or used under Part B of the IDEA except access by parents and authorized employees. The record shall include the name of the party, the date access was given, and the purpose for which the party is authorized to use the records. (34 CFR 300.614)

### IX. Miscellaneous Issues

- A. The Office for Civil Rights (OCR) issued guidance regarding report cards and transcripts for students with disabilities. OCR opined that report cards may contain information about a student's disability, special education services received and the student's progress in specific classes, course content or curriculum. Transcripts, however, may not contain information that the student has a disability or was receiving special education services. Transcripts may indicate that a student took classes with a modified or alternate curriculum by using an asterisk or other symbol as long as it does not specifically disclose that the student has a disability. Questions and Answers on Report Cards and Transcripts for Students with Disabilities Attending Public Elementary and Secondary Schools (United States Department of Education, Office for Civil Rights (2008)).
- B. A school district utilized a videotape of the student's behavior as an exhibit in a due process hearing. The taping was done without the consent of the student or parents. The Court held videotaping in public areas does not violate the constitutional right of privacy or FERPA. MR v. Lincolnwood Board of Education, District 74, 20 IDELR 1324 (United States District Court, Northern District, Illinois) (1994)). (Affirmed Rheinstrom v. Lincolnwood, 23 IDELR 1171 (United States Court of Appeals, 7th Circuit (1995)).
- C. A newspaper is not entitled to access the judicial proceeding and court file of the proceeding between a school district and a student. The Court cited FERPA as the basis for protecting the confidentiality of student information. Webster Groves School District v. Pulitzer Publishing Co., 16 IDELR 934 (United States Court of Appeals, 7th Circuit (1990).
- D. The presence of a court stenographer, employed by a school district, at a due process hearing does not violate the privacy rights of the student or parents. Caroline T. v. Hudson School District, 16 IDELR (United States

- Court of Appeals, 1st Circuit 1990).
- E. In most cases, HIPAA does not apply to a public elementary or secondary schools because the school is not a HIPAA covered agency. Even though a school employs psychologists, the school is not a HIPAA covered agency because the providers do not engage in any of the covered transactions under HIPAA. Even if the school is a HIPAA covered entity but maintains health information only on students in records that by definition are education records under FERPA, the HIPAA Privacy Rule does not apply. Joint Guidance on the Application of the FERPA and HIPPA Question 1 (United States Department of Ed and United States Department of Health and Human Services (2008))

#### X. Enforcement

- A. FERPA provides a complaint process which allows a person to file a complaint with the Family Policy Compliance Office (FPCO) of the U.S. Department of Education within 180 days of the alleged FERPA violation. The FPCO will conduct an investigation and issue written findings. The FPCO will order corrective actions if a violation is found and can ultimately seek the termination of federal funding to the District if there is a refusal to comply. (34 CFR 99.63)
- B. FERPA does not provide for a private right of action allowing a parent or student to sue the school for an alleged violation of the law. <u>Gonzaga University v. Doe</u> 536 U.S. 273 (United States Supreme Court (2002))

## XI. Training/Responsibility

- A. The IDEA requires that individuals who use personally identifiable information must receive training on confidentiality requirements. (34 C.F.R. 300.623(c)). Training should be provided to: teachers, administrators, support staff, other personnel with access to confidential information such as school bus drivers and playground/lunchroom supervisors and school board members. It is also recommended that confidentiality requirements be referenced in any staff or board orientation or training materials.
- B. One official at each agency must assume responsibility for ensuring the confidentiality of any personally identifiable information. (34 CFR 623(b))

### XII. Conclusion

A. In order to be proactive in avoiding confidentiality issues, district should insure that (1) a comprehensive district policy is in place, (2) annual notice is provided, and (3) staff training takes place. Although districts cannot guarantee confidentiality, through these measures they can take reasonable steps both to insure that the student's rights are protected and that district liability is minimized.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.